

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

IN RE PHARMACEUTICAL INDUSTRY  
AVERAGE WHOLESALE PRICE LITIGATION

MDL No. 1456

THIS DOCUMENT RELATES TO:

CIVIL ACTION: 01-CV-12257-PBS

**TRACK TWO SETTLEMENT**

Judge Patti B. Saris

**PLAINTIFFS' SECOND NOTICE OF FILING OF [PROPOSED] ORDER DIRECTING  
NOTICE OF TRACK TWO SETTLEMENT REVISION TO AFFECTED CLASS  
MEMBERS AND SCHEDULING FAIRNESS HEARING**

The Court should authorize the provision of another notice to claimants in the Track Two settlement who (i) need to provide evidence that they were administered an eligible drug, or (ii) will receive less under the redistribution proposal than they would have under the original distribution plan. The notice should advise of the changes and provide another period for comment.

Approximately 64,227 claimants would need to receive a notice of the settlement changes. These claimants fall into two categories: 55,092 claimants who had administrations of Epogen, Eligard or “not otherwise classified” J-Codes 3490 and 8999; and 9,135 claimants who would receive an award amount less than under the original Plan of Allocation and who did not have administrations of Epogen, Eligard or “not otherwise classified” J-Codes 3490 and 8999. Second Supplemental Declaration of Daniel Coggeshall Regarding Estimated Net Consumer Settlement Fund and Estimated Class 1 and Class 3 Consumer Payments for the Track Two Settlement (Dkt. No. 7752), ¶ 10.

Class Counsel now file herewith as Exhibit A a form of [Proposed] Order Directing Notice of Track Two Settlement Revisions to Affected Class Members and Scheduling Fairness Hearing (the “Proposed Order”).

The Proposed Order approves two forms of notice describing the revisions to the Proposed Settlement, one for affected Consumers of Classes 1 and 3 and one for TPP members of Classes 2 and 3. The consumer notices will *only* be mailed to the following Class members: (i) all Consumer Class members who previously filed timely claims and will receive less under the revised distribution formula than they would have under the original formula; (ii) those Consumer Class members in Class 1 whose CMS data indicates an administration of Epogen, Eligard or a drug under the “not otherwise classified” J-Codes J3490 and J8999 and those consumers in Class 3 whose claim forms indicate an administration for Epogen or Eligard; and (iii) those Consumer Class members with payments for Leukine and Novantrone after 2002. As indicated in the draft forms of notice for consumers, the content of the notice will differ depending on which of these categories applies to the particular consumer. The TPP notice will be mailed to all TPPs who previously filed timely claims.

Using plain language, the notices describe the changes being made to the Proposed Settlement, provide clear instructions for filing objections to the revision, inform affected Class members of a supplemental fairness hearing date, and advise Consumers that the Court has decided to provide an additional opportunity to request exclusion. For those consumers in Class 1 whose CMS data indicates an administration of Epogen, Eligard or a drug under the “not otherwise classified” J-Codes, and for those consumers in Class 3 who have filed claims for Epogen or Eligard, the notice explains the need for further documentation related to the affected drugs and how the consumer can provide such documentation.

The schedule of events set forth in the Proposed Order, assuming the Court approves of the rebalancing and redistribution proposal by August 31, 2011, is as follows:

| Date               | Event   |
|--------------------|---|
| September 16, 2011 | Mailing of notices to affected Class members.   |
| October 21, 2011   | Deadline for receipt of objections and Consumer requests for exclusion in response to the notices.  |
| October 28, 2011   | Deadline for receipt of additional documentation from Class 1 Consumers administered Epogen, Eligard or a drug under the "not otherwise classified" J-Codes.                                      |
| TBD                | Fairness hearing (at the Court's convenience, but Plaintiffs suggest no earlier than November 11, 2011 so that the Claims Administrator has time to process the documentation due on October 28). |

Plaintiffs respectfully request that the Court enter the Proposed Order.

DATED: August 19, 2011

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that I, Steve W. Berman, an attorney, caused a true and correct copy of the foregoing pleading to be delivered to all counsel of record by electronic service pursuant to Paragraph 11 of the Case Management Order No. 2, by sending on August 19, 2011, a copy to LexisNexis File & Serve for posting and notification to all parties.

By /s/ Steve W. Berman

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